Petition

81-808

No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

CHARLES R. KESTER, ROLAND D. LIBBY, HAZEL D. SUTHERLAND, ET. AL.,
Petitioners,

v.

ALAN K. CAMPBELL, DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT, CIVIL SERVICE COMMISSION OF THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether Executive Order 10,000, which requires deductions in the cost of living allowance (COLA) of federal employees who are furnished commissary, lodging, or other purchasing privileges, intended the words "are furnished" to mean "are furnished as a direct consequence of present federal civil service employment."

2. Whether the Cost of Living Allowance provided to federal civil service employees in non-foreign areas under 5 U.S.C. §5941 may be reduced or eliminated by the Civil Service Commission by virtue of such employees' access to commissary and exchange privileges resulting from prior or current service in or connections with the United States Armed Forces.

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on July 27, 1981.

OPINIONS BELOW

The judgment of the Court of Appeals reversing the decision of the District Court is reported at *Kester v. Campbell*, 652 F.2d 13 (9th Cir., 1981) and is set forth in the Appendix, *infra, pp.* 1a-7a. The opinion of the District Court granting summary judgment as to Count I of the Third Amended Complaint is reported at *Kester v. Campbell*, 467 F.Supp. 913 (D.Haw., 1979) and is set out in the Appendix, *infra*, pp. 8a-12a.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on July 27, 1981. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. §1254.

QUESTIONS PRESENTED

1. Whether Executive Order 10,000, which requires deductions in the cost of living allowance (COLA) of federal employees who are furnished commissary, lodging, or other purchasing privileges, intended the words "are furnished" to mean "are furnished as a direct consequence of present federal civil service employment."

2. Whether the Cost of Living Allowance provided to federal civil service employees in non-foreign areas under 5 U.S.C. §5941 may be reduced or eliminated by the Civil Service Commission by virtue of such employees' access to commissary and exchange privileges resulting from prior or current service in or connections with the United States Armed Forces.

EXECUTIVE ORDER INVOLVED

This case involves Section 205 (b) (2) of Executive Order 10,000. The section states:

(b) The Civil Service Commission shall . . .

(2) in fixing the Territorial cost-of-living allowance

ductions when quarters or subsistence, commissary or other purchasing privileges are furnished at a cost substantially lower than the prevailing local cost.

STATEMENT OF THE CASE [1]

This case involves the interpretation and application of Executive Order 10,000 issued in 1948 by President Harry Truman which established the cost-of-living allowance (COLA) system.[2] This system provides that employees of the Federal Government who are situated in areas apart from the continental United States and having living costs substantially higher than in the District of Columbia, are entitled to COLA in addition to their base pay.[3]

Executive Order 10,000 further provided that:

> pursuant to such subsection, make appropriate de-

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[1]The statement of the case is taken substantially from the opinions below.

[2]Section 104 of the Supplemental Independent Office Appropriations Act of 1949 P.L. 80-862, recodified as 5U.S.C. §5941. This section states in pertinent part:

> (a) Appropriations or funds available to an Executive agency for pay of employees stationed outside the continental United States or in Alaska whose rates of basic pay are fixed by statute, are available for allowances to these employees. The allowance is based on –
>
> (1) living costs substantially higher than in the District of Columbia;
>
> • • •
>
> The allowance may not exceed 25 percent of the rate of basic pay. Except as otherwise specifically authorized by statute, the allowance is paid only in accordance with regulations prescribed by the President establishing the rates and defining the area, groups of positions, and classes of employees to which each rate applies.

[3]*Id.*

> (b) The Civil Service Commission shall . . .
> (2) in fixing the Territorial cost-of-living allowance . . . make appropriate deductions when quarters or subsistence, commissary or other purchasing privileges *are furnished* at a cost substantially lower than the prevailing local cost. Exec. Order No. 10,000, §205 (b) (2), 3 C.F.R. 795 (1943-1948 Compilation) (1957) (emphasis added).

In 1976, the phrase "are furnished" was interpreted by the Civil Service Commission (now known as the Office of Personnel Management) to mean furnished by *any source* in the Federal government. 5 C.F.R. §591.201, *et seq.* (1976).

Plaintiffs then filed a class action in the United States District Court for the District of Hawaii, challenging said Civil Service Commission's interpretation and seeking the restoration of COLA benefits withheld because of the interpretation.[4] The class is made up of Federal Civil Service employees on the islands of Kauai and Oahu, State of Hawaii, who are entitled to receive commissary and exchange privileges as a consequence *independent* of their present employment with the Federal Civil Service and whose COLA was reduced or eliminated because of the above-mentioned Civil Service interpretive regulations. This class included retirees from military service, dependents of retired military servicemen, dependents of active duty military servicemen and widows, widowers or dependents of deceased mili-

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[4]Plaintiffs' COLA benefits were temporarily restored by Executive Order 12,070, effective July 30, 1978. The present issue therefore pertains to COLA benefits withheld from December 5, 1976 to July 30, 1978. *Kester v. Campbell*, 652 F.2d 13, n.2 (9th Cir., 1981). App., *infra*, *pp. 2a-3a*. Though under the Commission's and the President's interpretation, the Executive Order could be withdrawn at any time, resulting in potential loss fo future benefits.

tary servicemen. Defendants are members of the Civil Service Commission. Jurisdiction was based upon the Federal Tort Claim Act[5], the Administrative Procedure Act[6], and upon the federal question jurisdiction statute.[7]

Cross-motions for summary judgment were filed with Defendants also filing in the alternative, a motion to dismiss. The District Court granted summary judgment to plaintiffs on Count 1 of their Third Amended Complaint.[8] The Court opined that the phrase "are furnished" could only reasonably be interpreted to mean "are furnished as a consequence of the person's present civil service employment."[9] The Civil Service Commission's interpretation was held to be unreasonable in view of the absurd results it would cause. Defendants then appealed the District Court's order to the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit Court of Appeals reversed the District Court and remanded the case with directions to dismiss Count 1. It held that the interpretation by the Civil Service Commission was reasonable in light of the Order's ambiguous language.[10]

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[5]28 U.S.C. §1346(b) (1976)

[6]5 U.S.C. §702 (1976)

[7]28 U.S.C. §1331(a) (1976).

The Ninth Circuit Court of Appeals, however, based jurisdiction under the Tucker Act, 28 U.S.C. §1346(a)(2), 1491 (supp. II. 1978). See, *Kester*, 652 F.2d 13 (9th Cir., 1981).

[8]Although plaintiffs alleged eight different and separate counts in their Third Amended Complaint, just three were the basis for the cross-motions for summary judgment. The District Court decided the issue based only on Count I. See *Kester v. Campbell*, 467 F.Supp. 913 (D. Haw., 1979).

[9]*Kester*, 467 F.Supp. at 914.

[10]652 F.2d 13

REASONS FOR GRANTING THE WRIT

The Decision Below Has Decided An Important Federal Question Of First Impression Regarding The Interpretation Of An Executive Order By An Administration Agency Which Has Wide Ranging Adverse Effects And Results.

A. The decision affects thousands of civil service employees and involves millions of dollars.

If permitted to stand, the decision of the Ninth Circuit Court of Appeals will severely affect approximately 2,000 federal civil service employees in Hawaii by disallowing about 1½ years of COLA benefits that they had relied upon when accepting employment with the federal civil service. The amount of money withheld from the plaintiff class is substantial in total amount[11] as well as per employee. Should this Court decide to review this case, it will be one of first impression and one with great impact, not only practically, but in terms of precedence. The application of Executive Order 10,000 involves federal employees and federal importance which has not been, but should be settled by this Court.

This interpretation by the Ninth Circuit Court of Appeals has caused a great injustice upon the plaintiff class because it essentially penalizes the class for either having served in the United States Armed Forces or being dependent upon said former military personnel.

Despite the absence of conflicting decisions by the Circuit Court of Appeals of any other circuits (the issue is one as-

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[11]Approximately $6,000,000.00 is at issue. It reflects the amount withheld from the plaintiff class in COLA benefits between December 5, 1976 and July 30, 1978.

sociated to the areas outside the continental United States thereby not affecting those circuits covering the continental states), the question is an important one under Rule 19 of the Supreme Court Rules where a large amount of money is involved and regarding a large number of persons whose right to these and future monies will remain uncertain until the dispute is finally settled. *E.g., United States v. Constantine*, 296 U.S. 287, 80 L.ed 233, 56 S.Ct. 223 (1935).

The Ninth Circuit's holding is a benchmark decision because it also affects not only the plaintiff class in this case but the civil service employees in all non-foreign areas outside the contiguous states, including Alaska, Guam and the Virgin Islands. The impact is extraordinary.

B. *The decision of the Civil Service Commission is unlawful and contravenes the important purposes, policy and intent of the law.*

The decision upholding the Civil Service Commission's definition of "are furnished" defeats the major underlying intent, purposes and policy of Section 205 (b) (2), Executive Order 10,000. A thorough and complete examination of the history and express language of the law reveals the purposes as basically being three-fold. (See generally, "Pay Differentials and Related Compensation Problems in the Federal Service Outside the States.") First, it was promulgated to give Federal civil service emlpoyees working in certain designated non-foreign areas economic parity or equivalency with their civil service colleagues in the District of Columbia. Second, the statute was to give uniformity of application of the law within specific geographic areas. Third, the order was to provide inducements for civil service employees to encourage them to seek employment in non-foreign areas outside the continental United States. The

Ninth Circuit's agreement with the Civil Service Commission's interpretation of Section 205 (b) (2) effectively and totally frustrates these purposes, consequently destroying the original intent and policy of the Federal law.

The Ninth Circuit's decision is also momentous because it established a basis which significantly broadened the powers of the Civil Service Commission. By the Civil Service Commission's construction of the phrase "are furnished," and the Ninth Circuit's affirmation of such construction, the Commission has been permitted to essentially create new law. To allow an administrative agency to "interpret" a provision in a totally unlawful and unreasonable manner in view of the original intent of its creators and the executive office, is in essence, providing the agency with extraordinary quasi-legislative authority. The broadening and expanding of the Civil Service Commission's power is one of great import which this Court should address.

The Commission's unlawful and irrational explanation of Section 205 (b) (2) unmistakably supercedes the bounds of legality and the authority vested in them. When the creation or destruction of laws is vested in the guise of an "administrative interpretation", a review is desperately needed in order to protect the ever-weakening doctrine of separation of powers between law-making entities and administrative entities.

Section 205 (b) (2) has received long and continued executive construction and consistent interpretation by the Civil Service Commission for 28 years.[12] Then, in 1976, the Commission took a 180 degree turnabout by its unilateral interpretation of the Order thereby cutting off COLA benefits to thousands of Civil Service employees who had been

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[12]Executive Order was promulgated in 1948.

receiving it from its inception in 1948. The plaintiff class reflects the group of persons who have been adversely affected by the Civil Service Commission's abuse of authority in unlawfully revamping the thrust of Executive Order 10,000.

It has been held by this Court that a judgment of the Court of Appeals that contravenes and interferes with the interpretation of a statute by an administrative agency is important enough to merit a granting of a petition for writ of certiorari. *E.g., Federal Power Commission v. Texaco, Inc.*, 417 U.S. 380, 383, 94 S.Ct. 2315, 41 L.Ed.2d 141 (1974); *Federal Open Market Committee of the Federal Reserve System v. Merrill*, 443 U.S. 340, 99 S.Ct. 2800, 61 L.Ed.2d. 587 (1979). The same concerns that prompt the enactmnet of specific federal legislation dictate that this Court review the application and effect of those laws. Otherwise, the Ninth Circuit's decision, if left standing, would seriously interfere with the implementation of national policy. This long standing policy, as emphasized earlier, is further evidenced by President Carter's Executive Order[13] providing a temporary restoration of COLA benefits to civil service workers situated in Plaintiffs' class in 1978.

The Civil Service Commission's interpretation as an administrative agency, although admittedly given due deference, must not be inconsistent with the statute from which the interpretation is made. *United States v. Larionoff*, 431 U.S. 864, 97 S.Ct. 2150, 53 L.Ed.2d. 48 (1977). In *Larionoff*, this Court granted review of the lower court because the issue revolved around the United States Navy's interpretation of the variable Re-enlistment Bonus ("VRB") statute[14]

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[13]see f.n. 4, *supra*.

[14]The VRB statute varied the monetary incentive for reenlistment according to the needs of the armed services for personnel with particu-

(Footnote continued on next page)

and was claimed by the plaintiff class as being in contravention of the enabling legislation. This Court noted the importance of such administrative interpretation which contravened the language of the statute where regulations are applied, and provided the following test in regard to deciding claims which alleged that the administrative application was invalid:

> For regulations, in order to be valid, must be consistent with the statutes under which they are promulgated. We are persuaded that insofar as they required that the amount of the VRB . . . was to be determined by reference to the award level in effect at the time he [the enlistee] began to serve the extension, rather than at the time he agreed to it, the relevant regulations were contrary to the manifest purposes of Congress in enacting th VRB program, and hence invalid. The legislative history of the VRB statute makes those congressional purposes crytal clear.

Id. at 873 (citations omitted).

Like *Larionoff*, the Civil Service Commission's actions are contrary to the "manifest purposes of Congress", as directly and incontrovertibly expressed in the enabling statute.[15] The Civil Service Commission's interpretation thus cannot be viewed nor stretched to be seen as being reasonable. To carry out the Civil Service Commission's interpretation can only lead to illogical conclusions and results, not those of sound reasoning. The Ninth Circuit's reversal of the District

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[14]continued.
lar skills. After plaintiffs had re-enlisted on the basis of VRB, the Navy changed its rating of the plaintiff class' eligibility under the VRB.

[15]5 U.S.C. §5941.

Court's decision and the upholding of the Civil Service Commission's application of Section 205 (b) (2) has great magnitude in importance because of its virtual effect of amending Executive Order 10,000's well-established purposes and application.

The result of the Civil Service Commission's illegal construction of Section 205(b) (2) is the inherently unequal application of the law. It discriminates against some civil service workers in Hawaii, i.e., those in the plaintiff class, while not affecting other civil service employees despite also being located in Hawaii. There is also a resulting discrimination against the plaintiff class in relation to Civil Service employees in Washington, D.C. The major distinction is the fact that those employees in the plaintiff class are, or are dependent upon, former military servicemen. The unlawful application of the Civil Service Commission's interpretation has led to an incredible injustice. COLA benefits that have been withheld from the individual plaintiffs in the class range up into the thousands of dollars. The Civil Service Commission's action has been totally out of line and is clearly suspect. It would be a great miscarriage of justice to let the Ninth Circuit's decision go without review and be permitted to set a precedent.

C. *The decision will likely affect future decisions and other types of governmental benefits if allowed to stand.*

If the Civil Service Commission's so-called "interpretation" is deemed reasonable, the possible ramifications down the road are staggering. Armed with the support of the Ninth Circuit Court's decision, the following Federal civilian employees would also have their COLA benefits subjected to the Civil Service Commission's axe:

1. Recipients, or spouses of recipients of Food Stamps.

2. Recipients, or spouses of recipients of welfare benefits where funds are provided by the Federal Government.

3. Recipients, or spouses of recipients of Veteran's Administration medical benefits.

4. Recipients, or spouses of recipients of Veteran's Administration residential mortgages.

5. Recipients, or spouses of recipients of other Federal subsidized home mortgages.

6. Recipients, or spouses of recipients of Social Security benefits.

7. Recipients, or spouses of recipients of the G. I. bill.

8. Military reservists or members of the National Guard, or spouses, who receive limited exchange and medical benefits.

9. Recipients, or spouses of recipients of Aid to the Aged, Blind or Disabled benefits.

This list is not exclusive, but a mere sample of which civil service employees may be subject to having their COLA benefits reduced or eliminated like the plaintiff class. The "reasonableness" of the Civil Service Commission's interpretation is ludicrous. As each of these class of civil service employees are eliminated from receiving COLA benefits, which is not outside the realm of reality in the future, they will likely have to pursue a legal claim in the federal courts as this plaintiff class has done. Unless this Court decides to review the Civil Service Commission's interpretation and the Ninth Circuit's approval of said interpretation, the federal courts will likely be exposed and subject to future claims similar to the one at bar. The issue should thus be resolved now.

Furthermore, Executive Order 12,070 which restores the COLA benefits from August 1, 1978, is only a temporary restoration. Consequently, the COLA benefits of the plaintiff class remains in jeopardy. And, with the Civil Service Commission having been given the power and authority by the Ninth Circuit to interpret Executive Orders virtually any way they choose, these restored benefits are possibly awaiting reduction or elimination by way of another "interpretation" by the Civil Service Commission. Such would be the reality that could occur because of the Ninth Circuit Court's decision.

The members of the plaintiff class are hard pressed to understand why they must lose their COLA because they put twenty or more years of their life into the military. They should not be penalized for their service for the country, for becoming disabled due to military service; especially when other civil service employees who continue to receive COLA are buying homes with VA financing or getting social security benefits, or receiving welfare supplements to their income.[18] In sum, the only logical extension of the Civil Service Commission's interpretation would be to virtually eliminate COLA to everyone in light of the fact that few people are not touched in some way by the multitude of federally funded programs and benefits like commissary and exchange privileges. Only Congress can make such a dramatic decision. The Civil Service Commission's unlawful interpretation desperately demands a closely scrutinized review by this Court.

If for no other reason, the petition for writ of certiorari should be granted because the case involves principles im-

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[18]The District Court for the District of Hawaii agreed with this and found the interpretation of Section 205(b)(2) by the Civil Service Commission to thus be unreasonable and absurd. App. at p. 2a.

portant to the public and historical Federal policy. The incentive of military veterans and their dependents to be employed by the Federal civil service will be critically destroyed because of the atrocious and unlawful unilateral decision by the Civil Service Commission which the Ninth Circuit Court of Appeals has adopted.

Certiorari should be granted to prevent the expansion of the Civil Service Commission's authority and power and to restore those COLA benefits which were unlawfully, unjustifiably and unfairly taken away.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted and the decision below reversed.

Respectfully submitted,

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(Appendices follow)

APPENDICES

CHARLES R. KESTER,
ROLAND D. LIBBY,
HAZEL D. SUTHERLAND, ET AL.,

Plaintiffs-Appellees,

v.

ALAN K. CAMPBELL, DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT, CIVIL SERVICE COMMISSION OF THE UNITED STATES OF AMERICA,

Defendants-Appellants.

No. 79-4545

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Decided July 27, 1981.

Alice Daniel, Assistant Attorney General of Hawaii, Honolulu, Hawaii, Walter M. Heen, United States Attorney, Honolulu, Hawaii, Robert E. Kopp, John F. Cordes, Attorneys, Appellate Staff, Civil Division, Department of Justice, Washington, D.C., for Defendants-Appellants.

Theodore G. Meeker, David M. Robinson, Honolulu, Hawaii, for Plaintiffs-Appellees.

Before KILKENNY, SNEED and FARRIS, Circuit Judges.

FARRIS, Circuit Judge:

Appellants, members of the Civil Service Commission, appeal the district court's order granting plaintiffs' motion for summary judgment. We reverse.

In 1948, President Harry Truman issued Executive Order 10,000, and thereby established the cost-of-living allowance (COLA) adjustment system for federal employees. Under this system, employees of the federal government who are located outside the continental United States in locales having a substantially higher cost-of-living index than certain other areas are entitled to a cost-of-living allowance, in addition to their base pay. This Order specifically provided that:

> The Civil Service Commission shall . . . in fixing the Territorial cost-of-living allowance . . . make appropriate deductions when quarters or subsistence, commissary or other purchasing privileges *are furnished* at a cost substantially lower than the prevailing local cost.

Exec. Order No. 10,000, § 205(b)(2), 3 C.F.R. 795 (1943-1948 Compilation) (1957) (emphasis added).[1] In 1976, the Civil Service Commission issued new regulations which effectively interpreted the phrase "are furnished" to mean furnished by any source in the federal government. See 5 C.F.R. §§ 591.201—591.310 (1976).

Plaintiffs filed this class action in an effort to require the Commission to restore all COLA benefits withheld as a consequence of the regulations.[2] The class is composed of

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[1]Congress codified the source of authority for Executive Order 10,000 in 5 U.S.C. § 5941 (1976).

[2]The plaintiffs' COLA benefits were restored by Executive Order

(Footnote continued on next page)

plaining party) (quoting *Bakersfield City School District v. Boyer*, 610 F.2d 621, 628 (9th Cir. 1979). *Cf. Edelman v. Jordan*, 415 U.S. 651, 668, 678, 94 S.Ct. 1347, 1358, 1363). Federal Civil Service employees on Oahu and Kauai, Hawaii, who are entitled to commissary and exchange privileges for reasons independent of their present federal employment, but whose COLA was reduced or eliminated as a result of the passage of the new regulations. Jurisdiction was alleged under the Federal Tort Claims Act, 28 U.S.C. § 1346(b) (1976), the Administrative Procedure Act, 5 U.S.C. § 702 (1976) and under the general federal question jurisdiction statute, 28 U.S.C. § 1331(a) (1976). In March 1979, on cross-motions for summary judgment, the district court granted summary judgment for plaintiffs on count 1 of their amended complaint.[3] The district court held that the Commission's new regulations provided an unreasonable interpretation of the "are furnished" phrase because (1) the language of Executive Order 10,000 did not compel this construction, and (2) the new interpretation was inconsistent with that given the Executive Order historically. *Kester v. Campbell*, 467 F.Supp. 913, 915 (D. Hawaii.1979).

I. JURISDICTION

Both the nature of the plaintiffs' claim and the order en-

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[2]continued
12,070, effective July 30, 1978. *See* 5 U.S.C. § 5941 note (Supp. III 1979). Plaintiffs consequently only seek to recover COLA benefits withheld from Dec. 5, 1976, to July 30, 1978. *Kester v. Campbell*, 467 F.Supp. 913, 914 n. 1 (D.Hawaii.1979).

[3]Plaintiffs alleged eight separate theories or bases of recovery in their amended complaint. Although three of these were relevant to the cross-motions for summary judgment, the district court addressed and resolved the issue on only one of plaintiffs' theories. *See Kester*, 467 F.Supp. 914 & n.4.

tered by the district court require that we clearly determine the jurisdictional basis for this action. In the first count of their complaint, the plaintiffs alleged that the Commission exceeded its authority in promulgating the new regulations, and sought "permanent injunctive relief" against the Commission to prevent enforcement of the new regulations. The judgment entered by the district court reflected this request by ordering the Commission to issue regulations and implementing orders that would provide for restoration of any withheld COLA benefits.

We agree with the plaintiffs that their claims raise a substantial federal question under 28 U.S.C. § 1331(a) (1976). But this statute neither waives the federal government's sovereign immunity to suit nor indicates the appropriate forum for adjudication of the controversy. The plaintiffs' pleadings obliquely suggest that section 702 of the Administrative Procedure Act, 5 U.S.C. § 702 (1976), provides both of these factors. We disagree. Section 702 of the APA subjects the federal government to suit in the federal courts by parties seeking "relief other than money damages and stating a claim that an agency . . . failed to act . . . under color of legal authority." Plaintiffs' complaint specifically sought money damages against the Commission. The order entered by the district court was phrased in terms of a mandatory injunction only to allow the district court to determine the mode and method of restoration of the COLA benefits to the plaintiffs. In substance, the plaintiffs' pleadings, reflected by the district court's order, were concerned solely with an award of damages. We will not construe plaintiffs' request as one for injunctive relief when the relief sought is substantially equivalent to a request for a monetary award. *See Laguna Hermosa Corp. v Martin*, 643 F.2d 1376 at 1379 (9th Cir. 1981) (jurisdiction is not deter-

mined by relief pleaded but by "the real effort" of the com- 39 L.Ed.2d 662 (1974) (suit for injunctive and declaratory relief against state officers resulting in payment of retroactive benefits treated as a suit for damages). Accordingly, section 70_ does not provide jurisdiction for the plaintiffs' claims.

We conclude, however, that the district court had jurisdiction of the case under the Tucker Act, 28 U.S.C. § 1346(a)(2), 1491 (Supp. II 1978). The Tucker Act applies only to claims for money damages, *Rowe v. United States*, 633 F.2d 799, 802 (9th Cir. 1980), *cert. denied*, —— U.S. ——, 101 S.Ct. 2047, 68 L.Ed.2d 349 (1981), and not to suits for injunctive relief. *Richardson v. Morris*, 409 U.S. 464, 465-66, 93 S.Ct. 629, 630-31, 34 L.Ed.2d 647 (1973) (per curiam); *International Engineering Co. v. Richardson*, 512 F.2d 573, 577 & n.4 (D.C.Cir. 1975), *cert. denied*, 423 U.S. 1048, 96 S.Ct. 774, 46 L.Ed.2d 636 (1976). For claims against the government not exceeding $10,000, the district courts have concurrent jurisdiction with the Court of Claims. 28 U.S.C. § 1346(a)(2) (Supp. II 1978). This same jurisdictional limit applies to class actions where, as here, the individual claim of each class member does not exceed $10,000.00. *Pennsylvania v. National Association of Flood Insurers*, 520 F.2d 11, 25 (3d Cir. 1975); *March v. United States*, 506 F.2d 1306, 1309 n.1 (D.C.Cir.1974).

II. REASONABLENESS OF THE COMMISSION'S INTERPRETATION.

The Commission argues that the district court erroneously evaluated the reasonableness of the Commission's regulation. We agree.

In light of an agency's presumed expertise in interpreting executive orders charged to its administration, we

review such agency interpretations with great deference. *See Udall v. Tallman*, 380 U.S. 1, 16-18, 85 S.Ct. 792, 801-802, 13 L.Ed.2d 616 (1965). *Cf. United States v. Larionoff*, 431 U.S. 864, 872, 97 S.Ct. 2150, 2155, 53 L.Ed.2d 48 (1977) (interpreting regulation); *Knebel v. Hein*, 429 U.S. 288, 294-97, 97 S.Ct. 549, 553-55, 50 L.Ed.2d 485 (1977) (interpreting legislation); *Sierra Pacific Power Co. v. United States Environmental Protection Agency*, 647 F.2d 60 at 66 (9th Cir. 1981) (interpreting regulations); *University of Southern California v. Cost of Living Council*, 472 F.2d 1065, 1068-69 (Temp. Emer.Ct.App.1972) (interpreting executive order), *cert. denied*, 410 U.S. 928, 93 S.Ct.1364, 35 L.Ed.2d 590 (1973). To be sustained, the agency's interpretation need not be the only reasonable interpretation. See *Udall*, 380 U.S. at 16, 85 S.Ct. at 801; *Northwestern Electric Co. v. FPC*, 321 U.S. 119, 124, 64 S.Ct. 451, 453, 88 L.Ed. 596 (1944). All that is required is that the interpretation adopted by the agency be reasonable. *Udall*, 380 U.S. at 18, 85 S.Ct. at 802. The agency interpretation is considered reasonable "unless it is plainly erroneous or inconsistent with the [order]". *Larionoff*, 431 U.S. at 872, 97 S.Ct. at 2155; *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414, 65 S.Ct. 1215, 1217, 89 L.Ed. 1700 (1945).

The Commission's interpretation of Executive Order 10,000 is not inconsistent with the language or purpose of that order or plainly erroneous. See *Curlott v. Hampton*, 438 F.Supp. 505, 507 (D.Alas.1977), *aff'd in part and rev'd in part*, 598 F.2d 1175 (9th Cir. 1979). That the Executive Order mentioned no agency other than the Commission does not necessarily suggest, as the district court held, that only benefits furnished by civil service employment are to be deducted from the COLA. The language of the order is sufficiently ambiguous to permit several reasonable interpretations, including the one adopted by the Commission. *Cf. La-*

rionoff, 431 U.S. at 872, 97 S.Ct. at 2155 (ambiguities in regulations do not prevent agency interpretation from being reasonable). The interpretation adopted by the Commission does not inevitably lead to "incredible results." The Commission has not purported to broaden deductions from COLA benefits beyond those specifically mentioned in the Order. That there are other interpretations providing more favorable treatment to the plaintiffs is irrelevant in considering the reasonableness of the Commission's interpretation. *See Knebel*, 429 U.S. at 294-95 & n.14 97 S.Ct. at 553-54 & n.14. Finally, the reasonableness of the Commission's interpretation is not, under the circumstances here, any less clear merely because the Commission's interpretation breaks with the Commission's historic treatment of the Order. *Cf. Sierra Pacific Power Co.*, at 66 (agency's "interpretation of its regulations is entitled to great deference even where, as here, it has overruled or questioned its own prior interpretations"). While the commission's prior treatment of the Order may have been more equitable to the plaintiffs, this factor does not control the reasonableness of the Commission's interpretation. *Cf. District of Columbia v. John R. Thompson Co.*, 346 U.S. 100, 113-14, 73 S.Ct. 1007, 1014-15, 97 L.Ed. 1480 (1953) ("The failure of the executive branch to enforce a law does not result in its modification or repeal.")

Reversed and remanded with directions to dismiss Count I.

CHARLES R. KESTER, ROLAND D. LIBBY,
HAZEL D. SUTHERLAND and
WILLIAM B. SUTHERLAND, on behalf
of themselves and all others
similarly situated,

Plaintiffs,

v.

ALAN K. CAMPBELL, JULIE M. SUGARMAN,
and ERSA H. POSTON, and the
CIVIL SERVICE COMMISSION of the
UNITED STATES of AMERICA,

Defendants.

CIVIL NO. 76-0423
UNITED STATES DISTRICT COURT,
D. HAWAII
MARCH 13, 1979

Theodore H. Meeker, David M. Robinson,
Honolulu, Hawaii, for Plaintiffs

Alice Daniel, Assistant Attorney General,
Walter M. Heen, United States Attorney,
Robert E. Kopp, John F. Cordes, Attorneys,
Appellate Staff, Civil Division, Department of Justice,
Washington, D.C., for Defendant

Before KING, District Judge.

This is a class action in which plaintiffs challenge a new Civil Service Commission (CSC) regulation involving deductions from plaintiffs' cost-of-living allowance (COLA). The members of the plaintiff class are those United States Civil Service employees on the islands of Oahu and Kauai who are entitled to receive commissary and exchange privileges for reasons unrelated to their present employment with the civil service and whose COLA has been reduced or eliminated as a consequence of defendants' acts.[1] This class is made up of four subclasses: (1) retirees from military service; (2) dependents of retired military servicemen; (3) dependents of active duty military servicemen; and (4) widows, widowers or dependents of deceased military servicemen. Defendents are members of the CSC.[2]

In 1948, President Truman issued Executive Order 10,000, pursuant to section 104 of the Supplemental Independent Offices Appropriation Act, P.L. 80-862,[3] establishing the

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[1]Plaintiffs' COLA was restored by Executive Order 12.070, effective July 30, 1978. This order was intended to suspend the new regulations, reinstate the prior practice, and allow for a study on the reform of the COLA program. The present controversy, therefore, is over the COLA withheld from December 5, 1976 to July 30, 1978.

[2]This action was originally brought against Robert E. Hampton, Ludwig J. Andolsec, and Georgianna Sheldon, individually and in their capacities as members of the CSC. The suit cannot be prosecuted successfully against these defendants personally, *see Barr v. Matteo*, 360 U.S. 564 (1959), and by virtue of the fact that the commission has been reconstituted, Alan K. Campbell, Jule M. Sugarman and Ersa H. Poston have been substituted as defendants. Rule 25(d)(1), F.R. Civ. P. *See* Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment, p. 1.

[3]Executive Order 10,000 also deals with certain sections of the Foreign

(Footnote continued on following page)

foundation upon which the CSC administers the system which allows certain employees in areas outside the continental United States to receive compensation in addition to their base pay. This is the scheme known as COLA. Hawaii falls within the ambit of Executive Order 10,000.

The issues now before the court are presented on cross-motions for summary judgment. Both parties agree that there is no genuine issue of material fact in dispute and each feels it is entitled to judgment as a matter of law. The legal question to be decided centers on a section of the Executive Order which states:

> (b) The Civil Service Commission shall . . .
>
> (2) in fixing the Territorial cost-of-living allowance . . . make appropriate deductions when quarters or subsistence, commissary or other purchasing privileges *are furnished* at a cost substantially lower than the prevailing local cost.

Exec. Order No. 10.000, §205(b) (2), 3 C.F.R., 1943-1948 Comp. 793 (1957) (emphasis supplied).

In 1976, defendants issued new regulations, 5 C.F.R. §591.201, *et seq.* (1978), which interpreted the words "are furnished," within the meaning of §205(b) (2), to mean furnished by *any source* in the federal government. This meant that members of the plaintiff class had their COLA reduced or terminated. Plaintiffs brought this suit challenging the new policy on three grounds.[4] First, they argue that

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[3](continued)
Service Act of 1946. This case only involves that part of the Executive Order concerning the Supplemental Independent Office Appropriations Act. The enabling legislation has subsequently been recodified as 5 U.S.C. § 5941.

[4]There were other theories set forth in the Third Amended Complaint, but only three are germane to the present motions.

the regulations have no basis under the statutory provisions of 5 U.S.C. §5941, the enabling statute, and Executive Order 10,000. Second, they argue that the regulations violate equal protection. Finally, they argue that the regulations violate due process. Because this matter will be determined on the first of these issues, the constitutional arguments will not be addresed.

Plaintiffs contend that the words "are furnished" mean "are furnished as a consequence of the person's present civil service employment." More importantly, however, in order to prevail in this action, plaintiffs must demonstrate that defendants' new interpretation is unreasonable. *See Knebel v. Hein*, 429 U.S. 288 (1977). Defendants' argument is that the words "are furnished" are broad and that their interpretation is well within reason. Because theirs need not be the *only* reasonable interpretation possible, they contend that the court must uphold their position.

The parties, in effect, have asked the court to supply the proper referent to the passive voice, "are furnished." In solving this problem, a reading of all of part two of Executive Order 10,000 is informative. In the entirety of that part, there is only one agency or entity named in relation to the provision of benefits: the CSC. Nowhere is there any mention of the "federal government" or the "United States government." If this court must search for the proper referent under such circumstances, the only reasonable conclusion is that the words "are furnished" refer to the civil service. Defendants' position finds no support here.

The logical extension of defendants' argument would lead to incredible results. If defendants are correct, then any civil service employee who receives COLA would have his or her COLA reduced if he or she obtained a Veteran's Ad-

ministration residential mortgage or any other federally-subsidized mortgage, GI Bill benefits, or any type of social security benefits. It might even be argued that defendant's interpretation would encourage divorce, where one spouse was in the military and the other in the civil service. This is absurd. Neither Congress nor the President could have intended to deprive federal employees of such benefits, or to force the employees to choose between these benefits and COLA. Defendants' position is not reasonable.

Finally, the record indicates the CSC had consistently applied plaintiffs' interpretation for some 28 years—from the inception of the COLA program until the new regulations in 1976. The 180° reversal after such a prolonged period of time is, to this court, unreasonable. The CSC should go to the President or to Congress to have the Executive Order or the enabling statute amended rather than unilaterally to reverse an interpretation that has been in force for so long.

Defendants have directed this court's attention to the case of *Curlott v. Hampton*, 438 F. Supp. 505 (D. Alas. 1977), a case identical to the one now before the court. In *Curlott*, the court held that the CSC's position was reasonable, and that the court was required to defer to the wisdom of the administrative agency which promulgated the regulations. This court respectfully disagrees.

Accordingly, plaintiffs' motion for summary judgment is granted as to Count I of the Third Amended Complaint.

Defendants' motion to dismiss or in the alternative for summary judgment is denied.

Opposition

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No. 81-808

In the Supreme Court of the United States

OCTOBER TERM, 1981

CHARLES R. KESTER, ET AL., PETITIONERS

v.

DONALD J. DEVINE, DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioners are a class of federal employees in Hawaii who seek cost of living allowances (COLA) that the government withheld between December 5, 1976, and July 30, 1978, pursuant to Exec. Order No. 10,000, § 205(b)(2), 13 Fed. Reg. 5453, 5455 (1948). COLA payments are authorized by 5 U.S.C. 5941, which permits the payment of additional compensation to federal employees living in certain high-cost areas, including Hawaii. The COLA may not exceed 25% of an employee's basic pay and may be

paid "only in accordance with regulations prescribed by the President * * *." 5 U.S.C. 5941(a).

In 1948 President Truman promulgated Exec. Order No. 10,000 to implement the COLA program pursuant to the directive of 5 U.S.C. 5941. 13 Fed. Reg. 5453 (1948). Exec. Order No. 10,000 required the Civil Service Commission (now the Office of Personnel Management) to determine the comparative cost of living in the District of Columbia and the various COLA areas, including Hawaii, and to establish appropriate COLA rates. Exec. Order No. 10,000, §§ 205(a), 210, 13 Fed. Reg. 5455, 5456 (1948). In addition, Exec. Order No. 10,000, § 205(b)(2), required the Commission to "make appropriate deductions when quarters or subsistence, commissary or other purchasing privileges are furnished at a cost substantially lower than the prevailing local cost."

The Civil Service Commission made no deductions under the "are furnished" provision of Section 205 (b)(2) until 1974. In 1976, the Commission applied the provision for the first time to federal employees living in Hawaii. 41 Fed. Reg. 51579 *et seq.* (1976). The new Hawaii COLA rates reduced the compensation received by Hawaii federal civil servants who "are furnished" government-provided commissary, exchange, lodging, or other such privileges. The reduced rates applied both to employees whose access to commissary or other privileges derived directly from their civilian positions and to employees whose access to lower-cost privileges derived from military retirement, military dependency, or marriage to a military spouse. A class of employees with military eligibility for purchasing privileges filed this lawsuit in the United States District Court for the District of Hawaii, claiming that the "are furnished" provision should apply only to privileges received as a direct

incident of employment. During the pendency of the suit, President Carter suspended enforcement of the "are furnished" provision against petitioners' class, whose full COLA was restored prospectively. Exec. Order No. 12,070, 43 Fed. Reg. 28977 (1978). Petitioners' suit, therefore, seeks back payment of the COLA withheld between December 1976 and July 1978 (Pet. App. 3a n.2).

On cross-motions for summary judgment, the district court entered judgment for petitioners, holding unreasonable the Civil Service Commission's view that the "are furnished" provision of Exec. Order No. 10,000 authorized the deductions in petitioners' COLA (Pet. App. 8a-12a; 467 F. Supp. 913). The court of appeals reversed (Pet. App. 1a-7a; 652 F.2d 13). The Ninth Circuit first cited the "agency's presumed expertise in interpreting executive orders charged to its administration," and the court's obligation to "review * * * agency interpretations with great deference" (Pet. App. 5a-6a). The court then concluded that the Commission's interpretation of Exec. Order No. 10,000 was reasonable, because it was "not inconsistent with the language or purpose of [Exec. Order No. 10,000] or plainly erroneous" (*id.* at 6a).

The court of appeals' decision is correct, and we rely fully on its reasoning. There is no conflict among the circuits nor any other reason for further review.

1. Petitioners contend that the "Commission's unlawful and irrational explanation of Section 205(b)(2) unmistakably supersedes [*sic*] the bounds of legality and authority vested in them" (Pet. 8). But the plain language of Section 205(b)(2) fully justifies the Commission's interpretation. The section requires "appropriate deductions when quarters or subsistence, commissary or other purchasing privileges are furnished at a cost substantially lower than the prevail-

ing local cost." Petitioners indisputably "are furnished" such lower cost privileges due to their status as military retirees, spouses, or dependents. On its face, therefore, Section 205(b)(2) applies to petitioners. Nothing in the section suggests that, to trigger COLA deductions, the purchasing privileges must, as petitioners urge, be furnished to employees directly in connection with their civilian employment. In short, because Section 205(b)(2) mandates COLA deductions whenever civilian employees "are furnished" commissary or other such privileges, and because petitioners unquestionably were furnished these privileges, the 1976-1978 COLA deductions were valid.

Moreover, even if petitioners' alternative construction of Exec. Order No. 10,000 were plausible, the courts must defer to agency interpretations of Executive Orders charged to the agency's administration, unless there are "compelling indications" that the agency is wrong. See, *e.g.*, *FEC* v. *Democratic Senatorial Campaign Committee*, No. 80-939 (Nov. 10, 1981), slip op. 8-15; *United States* v. *Larionoff*, 431 U.S. 864, 872-873 (1977); *Udall* v. *Tallman*, 380 U.S. 1, 16-18 (1965). Here, the Commission's interpretation cannot be characterized as unreasonable because, as we have explained, it follows directly from the language of Section 205(b)(2). In addition, the Commission's interpretation is fully consistent with the purpose of the COLA program. By treating equally benefits received directly by a civilian employee and those received collaterally through a military connection, the Commission's interpretation ensures that the full COLA is paid only to employees suffering the full consequences of high living costs, not to employees who may ameliorate the impact of high costs through access to government-provided purchasing benefits. Thus, the Commission rationally construed Exec.

Order No. 10,000 in applying it to petitioners, and the court of appeals correctly deferred to the Commission's view. See also *Curlott* v. *Hampton*, 438 F. Supp. 505, 507 (D. Alas. 1977), rev'd on other grounds, 598 F.2d 1175 (9th Cir. 1979).

2. Petitioners advance two additional contentions. First, they challenge the Commission's "180 degree turnabout" (Pet. 8) in 1976 when, for the first time, it implemented Section 205(b)(2) in Hawaii.[1] But, contrary to petitioners' assertion, the Commission did not reject a prior interpretation of the Executive Order. The Commission never construed the "are furnished" provision, as petitioners would, to apply only to civilian employees receiving direct job-related purchasing privileges. Instead, the provision merely remained dormant between 1948 and 1974 and was not applied at all. This non-enforcement, as the court of appeals recognized (Pet. App. 7a), is of no consequence in this case. "The failure of the executive branch to enforce a law does not result in its modification or repeal." *District of Columbia* v. *John R. Thompson Co.*, 346 U.S. 100, 113-114 (1953).

Second, petitioners suggest that the "possible ramifications" of the Commission's interpretation are "staggering" (Pet. 11). Petitioners point to the possibility that an employee's COLA could be reduced if he received a government-subsidized mortgage, GI Bill benefits, social security benefits, or other government financial aid. The clearly correct reduction in petitioners' COLA in this case is not rendered illegal, however, because the Commission's interpretation might someday lead to an unwarranted reduction for other classes of employees. Neither the Civil Service Commission nor the Office of Personnel Management has

[1] Enforcement had begun in Guam and the Virgin Islands two years earlier.

ever extended the COLA reduction beyond the "employee package"-type benefits mentioned in Section 205(b)(2). In the unlikely event that OPM does so in the future, the legality of that action can be determined at that time.

3. Although petitioners characterize the court of appeals' ruling as "momentous" and as a "benchmark decision" (Pet. 7-8), in reality their suit merely seeks back pay for a group of federal workers on a legal theory of little prospective importance. The Commission interpretation challenged by petitioners no longer has significant practical impact, because President Carter suspended indefinitely enforcement of the "are furnished" provision against petitioners' class. In addition, petitioners' back pay suit is not over. The court of appeals merely reversed the district court's entry of judgment for petitioners on Count I of their complaint and remanded the case for further proceedings (Pet. App. 7a). The court of appeals' decision is therefore interlocutory, and for that reason alone does not warrant review. See *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.*, 240 U.S. 251, 258 (1916); *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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